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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1094

OHIO INNS, INC.,
Petitioner,

vs.

WILLIAM B. NYE, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF THE CASE

1. Nature of the Case

This case involves the sole question of whether the First Cause of Action of the Amended Complaint below stated a claim upon which relief can be granted. Rule 12(b)(6), Federal Rules of Civil Procedure.

2. Course of Proceeding

This action was commenced on January 10, 1975, by the filing of a Complaint by Ohio Inns, Inc., naming as Defendants William B. Nye, Director of the Ohio Department of Natural Resources, John J. Gilligan, Governor

of Ohio, and the Ohio Department of Natural Resources. An Amended Complaint was filed on February 3, 1975 (Appendix C, Petition for Writ of Certiorari). The Amended Complaint consisted of three "causes of action," the latter two of which were claims under state law submitted for adjudication under the District Court's pendent jurisdiction. Only the "First Cause of Action" purported to state a claim arising under federal law.

Ohio Inns' first cause of action rested solely upon 42 U. S. C. Sections 1983 and 1985 as sources of substantive law (memoranda of Ohio Inns later indicated that reliance upon 42 U. S. C. Section 1985 was limited to subsection (3) thereof). A lengthy recitation of facts alleged that Defendants had ordered the closing of the state facility at which Plaintiff Ohio Inns performed concession services pursuant to a contract with Defendant Ohio Department of Natural Resources. Such closing deprived Ohio Inns of revenue during the period in which the facility was closed.

Of great significance is the manner in which the first cause of action was drawn so as to attempt to invoke 42 U. S. C. Sections 1983 and 1985 (3). Paragraph 18 of the Amended Complaint recited the constitutional violations as deprivation of "due process of law and . . . equal protection of the laws guaranteed to plaintiff by the Fourteenth Amendment." However, facts elsewhere alleged in the first cause of action failed to support Ohio Inns' conclusion that its Fourteenth Amendment rights had been violated.

As to equal protection, the first cause of action lacked an allegation of the class of which Ohio Inns was a member and the discriminatory animus against such class upon which the actions of Defendants were based. Only vague innuendos appeared, such as that in Paragraph 11 ("real purpose and objective were to force plaintiff to deal with Local Union 505 . . . and to deal with Local Union 561") and Paragraph 14 ("[Defendants] were motivated solely by personal and political considerations.") The first cause of action, therefore, lacked factual allegations upon which an equal protection claim would rest.

As to violations of due process of law, the first cause of action was equally deficient. The allegations of fact asserted that Defendants had either breached Ohio Inns' concession contract, or interfered with the performance thereof, on malicious and pretextual grounds. No allegation appeared that Ohio Inns was deserving of notice or hearing procedures not afforded by the state. Rather, the Amended Complaint equated the act by state officials of breach of contract or tortious interference with contracual performance with a deprivation of due process of law. Such equation was made without any allegation that particular procedures due Ohio Inns had been ignored.

In response to motions to dismiss, the District Court, on January 7, 1976, filed an opinion and order dismissing the Amended Complaint as failing to state a claim upon which relief can be granted (Appendix A, Petition for Writ of Certiorari). As to 42 U. S. C. Section 1985(3), the Court accurately concluded that the first cause of action failed to allege a "class based, invidiously discriminatory animus" behind the Defendants' actions. As such, a cause of action had not been alleged, *Griffin v. Breckenridge*, 403 U. S. 88 (1971).

With regard to 42 U. S. C. Section 1983, the Court properly concluded that a mere allegation of an unlawful act (here, breach of contract or tortious interference with performance of a contract) by state officials did not rise to a deprivation of due process of law. Rather, the Court concluded that the Due Process Clause, as a general matter, protects property from deprivation by a state in the absence of fair procedures. Because the first cause of action failed to allege deprivation of procedures due Ohio Inns, a constitutional violation had not been alleged.

The Court addressed two further matters. Exercising its discretion, *United Mine Workers v. Gibbs,* 383 U. S. 715 (1966), the Court declined to adjudicate Ohio Inns' state law claims set forth in the second and third causes of action. Lastly, the Court held that Defendant Ohio Department of Natural Resources was immune from suit pursuant to the Eleventh Amendment, *Edelman v. Jordan,* 415 U. S. 651 (1974).

On March 4, 1976, Ohio Inns instituted an appeal in the Court of Appeals for the Sixth Circuit. In its brief on the merits, Ohio Inns challenged only the holding below regarding the adequacy of the first cause of action in stating a claim under 42 U. S. C. Sections 1983 and 1985(3). Therefore, Ohio Inns acquiesced in the dismissal of the Ohio Department of Natural Resources as immune from suit. The Court, on October 6, 1976, based upon the opinion below and the brief of Ohio Inns, affirmed on the ground "that it is manifest that the questions on which the decision of this appeal depends are so unsubstantial as not to need further argument."

Ohio Inns, on February 7, 1977, filed its Petition for Writ of Certiorari in this Court. Notably, the Petition does not simply set forth pertinent portions of the allegations of fact in the Amended Complaint but instead seeks to replead the first cause of action in the Amended Complaint through a lengthy Statement of the Case, including portions entitled "Petitioner's Concession Contracts" and "Events Underlying This Lawsuit." Such Statement goes beyond the allegations of fact in the first cause of action. Rather, solely at issue here is the legal sufficiency of the allegations of fact set forth in the first cause of action in stating a claim under 42 U. S. C. Sections 1983 and 1985(3). The Court is therefore respectfully requested to disregard all allegations of fact except those appearing in the first cause of action in the Amended Complaint (Appendix C, Petition for Certiorari).

The Petition sets forth five questions for review. Although two of the five questions cite 42 U. S. C. Section 1985(3), none challenges the holdings below that the first cause of action failed to state a claim under that section due to failure to comport with the requirements of *Griffin v. Breckenridge,* 403 U. S. 88 (1971). Nor does the Petition challenge the dismissal below of the Ohio Department of Natural Resources as immune from suit. Therefore, only the propriety of the holding with regard to 42 U. S. C. Section 1983 is presented to the Court for review.

QUESTION PRESENTED

Did the Amended Complaint state a claim for deprivation of due process of law under 42 U. S. C. Section 1983 upon which relief can be granted by alleging that state officials, upon pretextual grounds and with improper motives, breached or interfered with performance of a contract between the state and plaintiff concessionaire, where the Amended Complaint wholly failed to allege deprivation of procedures due under law.

———o———

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. The Sixth Circuit's Decision Appropriately Declined to Equate a Breach of Contract or Tortious Interference With Performance of a Contract by State Officials With a Deprivation of Due Process of Law.

The holding below—that a bare allegation of breach of contract or a tortious interference with performance of a contract by state officials does not state a cause of action for deprivation of due process of law—was clearly correct. Petitioner Ohio Inns cites no case which holds to the contrary. Counsel for Respondents know of no such case. Indeed, the District Court and Court of Appeals would have been bold indeed in ruling that the federal courts are empowered by 42 U. S. C. Section 1983 to address contract disputes between a state and a contractor. Surely,

that a state is a party to a contract or that a state official commits tortious interference with performance of a contract are not sufficient to render such breach or tort of interference as being of constitutional import.

Moreover, the result below comports with a recent decision of this Court, *Paul v. Davis,* 424 U. S. 693 (1976). There, the Court was most careful to indicate that 42 U. S.. C. Section 1983 does not extend to all unlawful acts of state officials merely because such act was performed by state officials. The Court stated, at 698:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" esablishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

And, at 701:

> [Respondent] apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights a body of general federal tort law, *Griffin v. Breckenridge,* 403 U. S. 88, 101-102 (1971); *a fortiori* the procedural guarantees of the Due Process Clause cannot be the source for such law.

Clearly, more is needed than a mere allegation of an unlawful act by a state official to state a claim under 42 U. S. C. Section 1983 for deprivation of due process of law.

Petitioner erroneously contends—as is evidenced in the Amended Complaint dismissed below — that the Due Process Clause confers protections upon a citizen which go beyond provision of fair procedures prior to deprivation of property by a state. The Amended Complaint sought redress for the deprivation, not redress based upon an absence of procedures through which such deprivation is to be effectuated. Indeed, the cases relied upon by Petitioner address the issue of requisite procedures, and do not establish 42 U. S. C. Section 1983 as a federal remedy for tort or breach of contract, *North George Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975); *Goss v. Lopez*, 419 U. S. 565 (1975); *Mitchell v. W. T. Grant Co.*, 416 U. S. 600 (1974); *Perry v. Sindermann*, 408 U. S. 593 (1972); *Fuentes v. Shevin*, 407 U. S. 67 (1972); *Lynch v. Household Finance Co.*, 405 U. S. 538 (1972); *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969).

This Court should decline to accept Petitioner's novel view of the Due Process Clause which was specifically rejected in *Paul v. Davis, supra.*

2. The Decision Below Did Not Conflict With Sterling v. Constantin and Scheuer v. Rhodes.

The case of *Sterling v. Constantin*, 287 U. S. 378 (1932), is distinguishable from the case at bar. There, the governor of Texas ignored existing administrative and judicial procedures available to achieve his goal of limiting production of oil, and marshalled military force

instead. Such a circumvention and violation of available judicial procedures were condemned by the Court, stating, at page 402, "In the place of *judicial procedure, available* in the courts which were open and functioning, he set up his executive commands which brooked neither delay nor appeal." (Emphasis added.) *Sterling*, therefore, decried the violation of established due process. The present case is quite different. No claim was made that Respondents failed to invoke existing procedures to achieve their goal. Rather, Respondents were alleged to have acted in a tortious manner and to have exceeded their lawful authority. Therefore, unlike *Sterling*, questions of procedure are simply not presented in the instant case.

Also distinguishable is *Scheuer v. Rhodes*, 416 U. S. 232 (1974). There, the complaint was not dismissed on a perceived deficiency in pleading the cause of action. Rather, the dismissal rested upon the affirmative defenses of Eleventh Amendment immunity and the common law doctrine of executive immunity. In the instant case, Respondents never claimed immunity below, but rather that the Amended Complaint was substantively deficient. *Scheuer* is therefore inapposite.

The decision below, therefore, did not conflict with *Sterling* and *Scheuer* so as to warrant issuance of a writ of certiorari.

3. The Courts Below Did Not Hold That a Right Secured by Contract is Not Protected by the Due Process Clause.

Ohio Inns misconstrues the decisions below as holding that the rights secured by Ohio Inns' contract with the state are not afforded protection by the Due Process Clause. Neither court so held, for such is clearly erroneous, *Board of Regents v. Roth*, 408 U. S. 564 (1972).

Rather the courts below held that the Amended Complaint simply did not allege facts which, if proven, would demonstrate a deprivation of due process of law. As discussed above, the Amended Complaint addressed the alleged acts of Respondents which interfered with Ohio Inns' performance of its contracts. Not a word of the Amended Complaint alleges deprivation of procedures due under law. In sum, in its effort to obtain review by this Court, Ohio Inns attempts to rely upon error which has not occurred.

4. The Courts Below Did Not Hold That Existence of a State Remedy Makes Unavailable a Federal Remedy.

In a like manner, Ohio Inns misconstrues the decisions below as holding that existence of a state remedy in breach of contract and tortious interference with contract in itself forecloses existence of a federal remedy. However, such a position, which conflicts with *Monroe v. Pape*, 365 U. S. 167 (1961), was never advocated below by Respondents, and neither court based its analysis upon such a misreading of *Monroe*. Although both courts noted existence of a state remedy, neither regarded such existence as determinative of whether a cause of action had been stated under federal law. Rather, the District Court carefully analyzed the Amended Complaint for sufficiency in the context of 42 U. S. C. Sections 1983 and 1985 (3) and determined that *nothing more* than a state claim was alleged. The Court of Appeals affirmed "for the reasons stated" in the opinion of the District Court. Therefore, neither court utilized an erroneous shortcut of identifying a concurrent state remedy to justify withholding of a federal remedy. Again, an error perceived by Ohio Inns did not occur below.

5. The Summary Affirmance by the Court of Appeals Was Proper.

Ohio Inns closes its Petition by requesting the Court to summarily remand the case to the Court of Appeals for plenary consideration. Such is unnecessary, for the issue before the Court of Appeals was of such clarity as to warrant summary affirmance. The opinion of the District Court closely analyzed the Amended Complaint, and noted the lack of allegations of class-based discriminatory animus necessary to state a cause of action under 42 U. S. C. Section 1985 (3), and the absence of allegations that requisite notice and hearing procedures were withheld from Ohio Inns so as to state a cause of action for deprivation of due process under 42 U. S. C. Section 1983. As such, the Amended Complaint was clearly faulty, and dismissal, and affirmance thereof, were clearly correct. In such circumstances, plenary consideration of Ohio Inns' erroneous arguments of law would constitute a waste of limited judicial resources, and should not be required.

In sum, the summary affirmance by the Court of Appeals does not warrant issuance of a writ of certiorari and remand for complete briefing and argument.

CONCLUSION

Petitioner Ohio Inns' theory of law upon which its case is based attempts to too broadly define the cause of action provided by 42 U. S. C. Section 1983 for deprivation of due process of law. As is apparent from the opinions below, the dismissal was entirely correct. Accordingly, a writ of certiorari should not issue.

Respectfully submitted,

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